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<https://doi.org/10.61796/ejlhss.v1i7.777>**WAKAF PROPERTY OWNERSHIP STATUS:
COMPARATIVE STUDY OF THE HANAFI MAZHAB AND
THE SYAF'I MAZHAB****Ikhsan, S.Sy., MH**

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Abstract: A comparative study between the Hanafi School and the Shafi'i School in the context of waqf property ownership shows interesting differences in the views of Islamic law regarding the transfer of ownership and management of waqf property. Nevertheless, both schools of thought try to manage waqf assets with the aim of providing optimal social and religious benefits in accordance with Islamic values. The aim of this research is to determine the ownership status of waqf assets from the perspective of the Hanafi school and the Syafi'i school. This type of research uses library research, while the data collection technique used by the author is by identifying themes or discourse from journals, theses from previous research results, the web (internet), or also taken from other information related to the theme of this research to look for things in the form of notes, newspapers and so on that are related to the research focus. The results of the research show that according to Abu Hanifah, waqf is the custody of an object which, according to the law, remains the property of the wakif in order to use its benefits for good, whereas according to the Syafi'i school of thought, the position of waqf assets as permanent assets that cannot be withdrawn is based on reasons. legal certainty for waqf recipients so that waqf assets can be used freely and are not tied to time. The main difference between the Hanafi School and the Syafi'i School lies in when the ownership of waqf assets is transferred. The Hanafi School states that the wakif has absolute ownership rights before the waqf is made, while the Syafi'i School believes that ownership immediately transfers to Allah SWT once the waqf is pronounced.

Keywords: Ownership Status, Waqf Assets, Hanafi School, Syafi'i School

This is an open-access article under the [CC-BY 4.0](https://creativecommons.org/licenses/by/4.0/) license**Intoduction**

Waqf is an act of handing over part of one's assets to be used forever or for a certain period of time, for the benefit of the people. Waqf in Islam is an act that will not be consumed by time and this act is highly favored by Allah SWT as a vehicle for communication and spiritual balance between humans and humans and also humans and their God. The Prophet Muhammad SAW said in a hadith which reads:

إِذَا مَاتَ ابْنُ آدَمَ انْقَطَعَ عَنْهُ عَمَلُهُ إِلَّا مِنْ ثَلَاثٍ: صَدَقَةٍ جَارِيَةٍ، أَوْ عِلْمٍ يُنْتَفَعُ بِهِ، أَوْ وَلَدٍ صَالِحٍ يَدْعُو لَهُ. رَوَاهُ مُسْلِمٌ

"When a human being dies, his good deeds will be cut off, except from three sources, namely alms (waqf), knowledge from which he can benefit, and pious children who pray for him." (HR. Muslim).

Seeing that the rewards of waqf are very important and the benefits are enormous, Rasulullah SAW appealed to and guided his friends to always be enthusiastic in donating their wealth for social and community interests with various examples and examples, both directly and according to his will, through his friends who were obedient and obedient to him, such as Umar bin Khattab who has donated the land he loves in Khaibar to the poor, relatives and guests (Directorate General of Islamic Community Guidance and Waqf Empowerment, 2006).

In the era of development of Islamic school scholars, there were often differences of opinion on certain issues, for example regarding waqf law and the position of waqf. According to the Syafii school of thought, waqf is holding assets that can be benefited from while the goods remain intact and the goods are lost to the waqif, and are used for something that is permissible. Meanwhile, the Hanafi school of thought states that waqf is an act of carrying out an action on an object, which has permanent status as property rights, by causing benefits to other parties for the sake of goodness, both now and in the future. Meanwhile, the Maliki school of thought believes that in waqf a person does not release his property from ownership, but waqf can prevent the wakif from carrying out actions that could release his property from ownership of the property to other parties. The Wakif is also obliged to donate the benefits, and cannot withdraw his waqf. According to Hambali, waqf is to absolutely restrain the freedom of the property owner in carrying out his property in a beneficial way by keeping the property intact and deciding all control rights over the property.

From the description above, it is clear that there are differences of opinion between the Hanafi school of thought and the Syafi'i school of thought regarding the position of waqf assets, so the author is interested in studying more deeply the status of ownership of waqf assets according to the perspective of the Maliki school of thought and the Syafi'i school of thought.

THEORETICAL BASIS

A. Understanding Waqf

Waqf comes from Arabic al-waqf is the masdar form of waqafa-waqafan-wawaqafan which means to hold back. According to Muhammad Daud Ali, the word waqf comes from Arabic which means stopping or staying in place, waqf also has the meaning of holding an object to take advantage of it according to Islamic teachings (Ali, 1998).

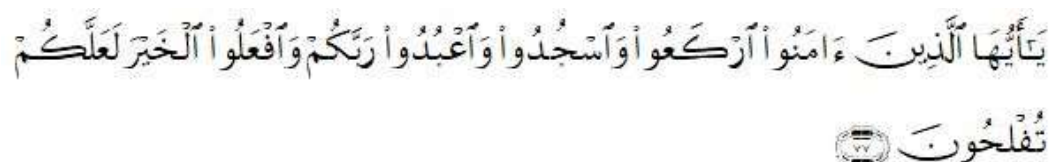
Islamic law, article 215, waqf is a legal act of a person or group of people or legal entity that separates part of their property and institutionalizes it forever for the purposes of worship or other public purposes in accordance with Islamic teachings. Meanwhile, according to law no. 41 of 2004 article 1, that waqf is a legal act to separate and hand over part of one's property to be used forever or for a certain period of time in accordance with one's interests for the purposes of worship and general welfare according to sharia (Tunggal, 2005).

Waqf assets can be used to overcome various social problems, for the benefit of the people in a sustainable manner without losing the original assets, starting from education, health, economy, transportation facilities, places of worship, means of da'wah activities and so on. With waqf, the value of eternal wealth, its benefits and goodness will continue to increase.

B. Legal Basis of Waqf

The basis for waqf law from the Koran is as follows:

- a. Qs. Al-Hajj Verse 77



"O you who believe, bow down, prostrate yourself, worship your Lord and do good deeds, so that you may gain victory ." (QS. al- Hajj: 77).

b. QS Al-Imran Verse 92

لَنْ تَنَالُوا الْبِرَّ حَتَّى تُنْفِقُوا مِمَّا تُحِبُّونَ وَمَا تُنْفِقُوا مِنْ شَيْءٍ فَإِنَّ اللَّهَ بِهِ عَلِيمٌ

"You will never reach (perfect) virtue until you spend part of the wealth you love. And whatever you earn, Allah knows ." (QS. Ali Imran: 92)

c. QS Al-Baqarah Verse 267

يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَنْفِقُوا مِنْ طَيِّبَاتِ مَا كَسَبْتُمْ وَمِمَّا أَخْرَجْنَا لَكُمْ مِنَ الْأَرْضِ وَلَا تَيَمَّمُوا الْخَبِيثَ مِنْهُ تُنْفِقُونَ وَلَسْتُمْ بِآخِذِيهِ إِلَّا أَنْ تُغْمِضُوا فِيهِ وَاعْلَمُوا أَنَّ اللَّهَ غَنِيٌّ حَمِيدٌ

"O you who believe, spend (in the way of Allah) some of the results of your good work and some of what We bring out from the earth for you. and don't choose the bad things and then spend on them, even though you yourself don't want to take them but by narrowing your eyes towards them. And know that Allah is all-rich and most praiseworthy ." (QS. al-Baqarah: 267)

C. Principles and Terms of Waqf

Whether the waqf is perfect or not is greatly influenced by the harmony contained in the act. According to the Indonesian waqf board (BWI), there are four pillars of waqf. Firstly, a person who is a waqif (al-waqif) is required to be able to carry out transactions, including being of legal age , of sound mind and not under duress. In Islamic fiqh, it is known that puberty and rasyid are more dominant in terms of age, while rasyid is focused on the maturity of reasoning. Based on the conditions above, waqf from an infidel is also permitted, because the nature of waqf itself falls into the category of non-mahdhah worship and this is different from votive worship (Azzam, 2010).

Second, the object donated (al-mauquf) is an asset that has a clear form, belongs to the person who donated it and whose benefits are long-lasting for use. Therefore, it is not permissible for waqf to take the form of benefits, because the form of waqf itself is goods. It is also permissible to waqf stolen property, because the goods become the property of those who take them. It's the same with waqf for blind people, because in waqf there is no requirement to be able to see. Waqf assets can also be in the form of capital money, for example shares in a company in any form. What is more important than assets in the form of capital is that they can be managed in such a way as to bring benefit and profit.

Third, people who receive waqf benefits (al-mauquf 'alaih), whether certain or not certain. In a certain amount, it is meant that a gift is handed over to one person, two people or more in a specified amount, the most important thing is that the intended person has the ability to own it at the time of the waqf procession. Therefore, it is not permissible to give waqf to people whose identity is not clear, for example, wanting to give waqf to their prospective children even though they do not yet have children or to poor children even though none of their children are poor.

Fourth, lafadz or waqf pledge (sighah), namely waqf which is done verbally, in writing, or with a sign, waqf is considered to occur if there is a statement of waqif (ijab) and the consent of the person giving the waqf does not require a sign. Gestures are only needed for wakifs who are unable to speak or write (Directorate General of Islamic Community Guidance and Hajj Organizers, 2005). The majority of ulama agree that sighat must be realized in every waqf, but only the Hanafi school of thought believes that sighah alone is a pillar of waqf. This difference is

just a difference in terms, because they all agree that everything must be realized in every waqf. If one of them does not materialize like a wakif then there is no waqf.

Methods

This research aims to determine the ownership status of waqf assets from the perspective of the Hanafi school of thought and the Syafi'i school of thought. Researchers try to describe what research subjects understand and describe. Then a qualitative approach was chosen using a descriptive method and this type of research used library research, namely research carried out by searching literature (libraries) in the form of journals, notes or reports of research results from previous research. Secondary data was obtained from observations about waqf from the perspective of Islamic law. The data collection technique used by the author is by identifying themes or discourse from journals, theses from previous research results, the web (internet), or also data taken from other information related to the theme of this research to look for things in the form of notes, newspapers. and so on related to the research focus. The collected data was then analyzed descriptively qualitatively

Result and Discussion

A. Abu Hanifah's Thoughts About the Status of Waqf Assets

According to Imam Abu Hanifah, waqf is holding an object which according to law remains the property of the wakif in order to use its benefits for policy. Based on this definition, ownership of assets cannot be separated from the wakif, in fact the wakif has the right to withdraw it and he may sell it. If he dies, the waqf assets become inheritance for his heirs, so what arises from the waqf is only: donating the benefits." Therefore, the Hanafi school defines waqf as not taking any action on an object that has permanent status as property by donating it to a good (social) policy. now and in the future (Department of Religion, 2006). "Holding objects by giving them legal legality as belonging to the person who is waqf and who is giving charity is a benefit for good" ('Abidin: 518).

Based on this definition, Abu Hanifah stated that the waqf contract is non-binding (common ghairu) in the sense that the person giving the waqf can withdraw the waqf and sell it. This means that waqf according to Imam Abu Hanifah does not relinquish the wakif's absolute ownership rights to the objects that have been donated.

The word habs in the definition above is a limitation to exclude assets that are not included as waqf assets, as someone giving collateral still has assets that are in the hands of another person (who is given collateral). The recipient of this guarantee only remains in the same assets, and if he dies, he can inherit it.

The definition above is to describe the definite form of waqf, as defined by Abu Hanifa. However, if we examine it further, basically the understanding of the term according to the fuqaha using the word habs is not appropriate for defining a definite form of waqf. Because in reality, in this form of waqf there is no retention of assets. Because the waqf assets can still be used for buying and selling, giving and other business of transferring ownership rights. This means that the waqf assets are truly retained (as Allah's right). This issue was later denied by Burhan al-Din, that waqf assets could definitely be withdrawn by the owner, as long as he was still alive, but the law was makruh.

the word habs (hold) is not necessary, because in a waqf like this, people can still sell assets if they want. Likewise, ownership rights still remain with the owner. As before he gave the benefits of the property as alms. Because the wakif (the person who donates) only expresses a desire to donate the benefits of the property, he can decide on his charity in the same way as before he donated it (Hamman, 4).

Ibn Abidin added the word hukm (law) after the word 'ala (designated). Some scholars say that this addition is a word belonging to Allah to define that the property no longer belongs to the wakif and is not transferred to another person but belongs to Allah ('Abidin: 268). The word hukm (law) used in the definition above means that everything that has not been handed over as a waqf

belongs to Allah, as does property given as a waqf. With this waqf, the element of property ownership belongs solely to Allah. This is different from property ownership before waqf. Allah allows him to sell and give it to others, as long as the property belongs to him.

Another difference in interpreting the recipient of infaq, with the words al-tasaddaq bi al-manfa'at (giving away benefits), it can be understood that the word alms is absolutely the giving of assets to the poor as a group of legitimate recipients (Abidin: 494). Thus, if we agree to apply this definition, of course waqf is not valid if it is given to oneself or a group of rich people. According to the al-Hanafi school of thought, waqf distributed to oneself and a group of rich people remains valid, as long as it is accompanied by the intention that ultimately the assets will be allocated to poor people.

According to Abu Hanifah, waqf is the custody of an object which, according to law, remains the property of the wakif in order to use its benefits for good. Based on this definition, the ownership of waqf assets cannot be separated from the wakif, in fact he is allowed to withdraw them and he can sell them. If the wakif dies, the assets become inheritance for his heirs. So what arises from the waqf is only "contributing benefits". Therefore, the Hanafi madzhab defines waqf as: "Not taking action on an object, which has permanent status as property, by donating its benefits to a benevolent (social) party, both now and in the future", for example, waqf for coconuts and transportation vehicles for interests of people and religion.

Meanwhile, according to Imam Abu Hanifah, waqf is defined as lending and borrowing, namely holding material objects (al-'ain) belonging to the wakif and donating or donating the benefits to anyone desired for benevolent purposes, as mentioned in the book Fathul Qadir by Ibnu Hammam, Imam Abu Hanifah is of the opinion that, the wakif's ownership of his property will not be lost due to waqf unless there is a judge's decision or when before he dies, he says: "When I die, I will donate my house. In the book Fathul Qadir it is also stated: According to Imam Abu Hanifah: retaining the form of objects (which are donated) still belong to the wakif and giving out the benefits like a loan.

In Abu Hanifah's opinion, waqf is defined as retaining material goods belonging to the wakif and donating or donating the benefits to anyone desired for benevolent purposes. According to Abu Hanifah, waqf is still stuck or remains in the hands of the wakif itself, in other words, the wakif is still the owner of the property he donated.

From Abu Hanifah's opinion, there are benefits for the wakif who is afraid of losing the object he donated, because the nadzir does not carry out the wakif's mandate/does not use/utilize the wakif object according to what the wakif wants, so here it can be seen from Abu Hanifah's opinion which Abu Hanifah allowed to withdraw the objects that had been donated.

Followers of the Hanafi school of thought (Hanafiyah ulama) are of the opinion that basically objects that can be donated are immovable objects. Because the object of the waqf continues to have a permanent 'ain (dzat/principal) nature which allows it to be utilized continuously. Abu Zahrah said in his book Mudharat fi al awqaf that, according to the Hanafi school of thought, movable objects can be donated under several conditions:

1. Moving objects should always accompany fixed objects. There are two things:
 - a. its relationship is very close to fixed objects, such as buildings and trees. According to them (the Hanafi school) buildings and trees are movable objects that depend on immovable objects.
 - b. something specifically provided for the benefit of a fixed object, for example a tool for work.
2. It is permissible to donate movable objects based on the *atsar* (behavior) of friends who allow donating weapons, armor and animals used for war (Department of Religion , 2006). It is permissible to donate movable objects that bring knowledge and is something that is usually done based on *urf* (tradition), such as donating books and manuscripts of the Koran. In the opinion of the Hanafi school: to replace waqf objects that are feared to be impermanent is to enable eternal benefits. They also allow

donating items that were commonplace in the past, such as donating a place to heat water, a shovel for work and so on.

Thus, it can be confirmed that Imam Abu Hanifah's thoughts on beneficial waqf are different from existing laws and regulations in Indonesia, seeing the large number of communities and several institutions that have implemented beneficial waqf with the aim of helping to alleviate needs that are already needed, therefore It is necessary to add legislation relating to beneficial waqf so that the public understands that donating an object does not require releasing the waqif's ownership rights.

B. Imam Syafii's Thoughts About Waqf

Waqf is holding assets that can be benefited and their substance is eternal and used for non-immoral purposes. Shah Ibrahim Bajuri expressed his thoughts that, waqf is holding certain treasures that can be transferred and denying them the benefits they can be taken from, while the condition of the goods remains, and in the sense of deciding on pentasarufan, that these assets will be given in a good way because it brings one closer to Allah. (Bajuri, 2007),

Imam Syafi'i is of the opinion that the waqf contract is a common contract (or mulazamah). Therefore, objects that have been donated no longer belong to the waqif, but have become public property (or belong to Allah). The consequence is that objects that have been donated cannot be sold, donated or inherited because they no longer belong to individuals, but to the public (ummah).

The good side of making waqf assets permanent assets is that the waqf recipient not only has the capacity for business use rights but also has become the property of the waqf recipient. In this way, waqf recipients can utilize waqf assets permanently because they have full ownership. The drawback is that if at any time the waqf assets are withdrawn by the waqf giver, this cannot be done because the original waqf owner no longer has the legal authority to take back the waqf assets. The temporary benefit is that the original waqf owner can withdraw his waqf assets whenever he needs them and this can be done at any time. The drawback is that the recipient of the waqf only seems to have business use rights and not property rights.

C. Analysis of the Thoughts of Imam Abu Hanifah and Imam Syafi'i Regarding the Status of Waqf Assets

According to Abu Hanifah, waqf is the custody of an object which, according to law, remains the property of the wakif in order to use its benefits for good. Based on this definition, the ownership of waqf assets cannot be separated from the wakif, in fact he is allowed to withdraw them and he can sell them. If the waqif dies, the assets become inheritance for his heirs. So what arises from the waqf is only "contributing benefits". Therefore, the Hanafi madzhab defines waqf as: "Not taking action on an object, which has permanent status as property, by donating its benefits to a benevolent (social) party, both now and in the future", for example, waqf for coconuts and transportation vehicles for interests of people and religion.

According to the author, Imam Syafi'i's opinion which determines the position of waqf assets as permanent assets that cannot be withdrawn is based on reasons of legal certainty for waqf recipients so that waqf assets can be used freely and are not bound by time. Another reason is for administrative order, with its permanent nature, assets do not keep changing names and changing names, which requires quite a lot of money. With its permanent nature, it can avoid lawsuits against the heirs of the waqf giver in the future when the waqf giver dies.

The reality that exists in Indonesia today is that nadzir often misuse waqf assets for their own interests. Regardless of the waqf pledge, initially, the objects donated were for the benefit or use as mandated by the wakif so that the heirs would not hesitate to Reluctant to withdraw assets that were donated by their parents during their lifetime.

Conclusion

Waqf comes from Arabic al-waqf is the masdar form of waqafa-waqafan-wawaqafan which means to hold back. According to Muhammad Daud Ali, the word waqf comes from Arabic which means stopping or staying in place, waqf also has the meaning of holding an object to take

advantage of it according to Islamic teachings . According to Abu Hanifah, waqf is the custody of an object which, according to law, remains the property of the wakif in order to use its benefits for good. Imam Syafi'i who determined the position of waqf assets as permanent assets that could not be withdrawn was based on reasons of legal certainty for waqf recipients so that waqf assets could be used freely and were not bound by time. Thus, a comparative study between the Hanafi School and the Syafi'i School in the context of waqf property ownership shows interesting differences in the views of Islamic law regarding the transfer of ownership and management of waqf property. Nevertheless, both schools of thought try to manage waqf assets with the aim of providing optimal social and religious benefits in accordance with Islamic values

References

- [1]. Abdul Aziz Muhammad, Azzam. *Fiqh Muamalat: Sistem Transaksi dalam Fiqh Islam*. (Jakarta: Amzah, 2010).
- [2]. Al-Qusyairi, Muslim bin Hajaj. *Shahih Muslim*, (Bairut: Daral Fikr, 1993)
- [3]. Departemen Agama, *Pedoman Pengelolaan & Pengembangan Wakaf*, (Jakarta: Departemen Agama RI, 2006)
- [4]. Departemen Agama, *Fiqh Wakaf*, (Jakarta: Direktorat Pemberdayaan Wakaf Direktorat Jenderal dan Bimbingan Masyarakat Islam, 2006)
- [5]. Direktorat Jenderal Bimbingan Masyarakat Islam dan Penyelenggara Haji, *Fiqh Wakaf*, (Jakarta: Direktorat Pengembangan Zakat dan Wakaf, 2005)
- [6]. Direktorat Jenderal Bimbingan Masyarakat islam dan Pemberdayaan Wakaf, *Paradigma Baru Wakaf di Indonesia*, (Jakarta: Departemen Agama RI, 2006)
- [7]. Hadi Setia Tunggal, *Undang-undang wakaf Republik Indonesia Nomor 41 Tahun 2004*, (Jakarta: Harvarindo, 2005).
- [8]. Ibn Hamman, *fath al-qadir*, vol. 5 (mesir: Mustafa Muhammad, t.tp)
- [9]. Ibnu 'Abidin, *Rad al-Muhtar*, Vol. 6, (Beirut: Dar al-Kutub al-Ilmiyah, t.th)
- [10]. Muhammad Daud Ali, *Sistem Ekonomi Islam Zakat dan Wakaf*, (Jakarta: Ui Pres, 1998).
- [11]. Syeh Ibrahim Bajuri, Ibrahim Bajuri, Juz II, (Semarang: Hikmah Keluarga, 2007).